IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ALAN HOROWITCH,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION FILE NO.**
v.	)	**6:06-CV-1703-Orl-19JGG**
	)	
DIAMOND AIRCRAFT INDUSTRIES, INC., a foreign corporation,	)	
	)	
Defendant.	)	
	)	

DEFENDANT DIAMOND AIRCRAFT INDUSTRIES, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

Defendant Diamond Aircraft Industries, Inc. ("Diamond Aircraft) files its Opposition to Plaintiff's Motion to Compel as follows.

INTRODUCTION

This Court should deny Plaintiff's Motion to Compel in its entirety. Diamond Aircraft has provided full and complete responses to all the discovery requests properly relating to Diamond Aircraft's contract with Horowitch (the "Contract"), drawing the line only where Plaintiff seeks information relating to Diamond Aircraft's other prospective customers and requests that seek discovery of highly sensitive proprietary information that is not reasonably calculated to lead to the discovery of admissible evidence.

While Horowitch tediously trots out the hackneyed and overused tactic of overheated, false, and defamatory claims of "stonewalling" his self-proclaimed "legitimate pursuit of reasonable, clear, and perfectly relevant discovery,"[1] the truth of the matter is the disputed discovery requests exceed the bounds of Rule 26 of the Federal Rules of Civil Procedure which

[1] *See* Plaintiff's Motion to Compel, p. 1.

limit the scope of discovery to that which is "relevant to the subject matter involved in the pending action" and "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Additionally, proper discovery must address "...the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues," Fed. R. Civ. P. 26(b)(2). As explained in detail below, this Court should deny Horowitch's Motion to Compel because Diamond Aircraft has provided full and complete responses to all of Horowitch's discovery requests that are relevant to Horowitch's claims in this case.

BACKGROUND

For the sake of brevity, Diamond Aircraft refers the Court to and incorporates by reference the Background Section of Defendant's Brief in Opposition to Plaintiff's Motion to Amend and Amended Motion for Leave to Amend Complaint filed on March 5, 2007.[2]

ARGUMENT AND CITATION OF AUTHORITY

The Court should deny the Motion to Compel because the objections raised by Diamond Aircraft are valid, and Horowitch is not entitled to further responses from Diamond Aircraft. All of the interrogatories and document requests that are the subject of this Motion seek information that either exceed the scope of permissible discovery or call for the production of highly

[2] Diamond Aircraft further supplements the background section by stating that on January 2, 2007, Horowitch served Diamond Aircraft with discovery requests, including interrogatories and document requests. (A copy of these discovery requests are attached to Plaintiff's Motion as Exhibits A and B). Diamond Aircraft filed timely responses. (A copy of Diamond Aircraft's responses is attached to Plaintiff's Motion as Exhibit C). The parties attempted to resolve the issues raised by Horowitch's overly broad discovery requests through correspondence, but were unable to reach agreement. (A copy of the letters exchanged by counsel are attached hereto as Exhibits A and B). Horowitch subsequently filed an Amended Complaint on March 15, 2007, adding a claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Diamond Aircraft will promptly move the Court to dismiss Horowitch's FDUTPA claim, on grounds that none of the operative events giving rise to this lawsuit took place in Florida; none of the parties, witnesses, or other evidence are located in this state; and Horowitch is not a Florida resident.

sensitive proprietary documents pertaining to the design and manufacture of the aircraft that is the subject of the Contract in dispute. These requests have absolutely nothing to do with this litigation. Diamond Aircraft sets for the below the specific arguments made by Horowitch in its Motion to Compel and Diamond Aircraft's responses thereto.

a. Interrogatory No. 2

Beginning a pattern which is to be repeated many times over in his Motion, Plaintiff attempts to create an issue where none legitimately exists in respect to Diamond Aircraft's substantive responses to Interrogatory No. 2, which asks Diamond Aircraft to "identify each individual who participated in the drafting of the form contract that was utilized by Dr. Horowitch and Diamond to memorialize their agreement regarding the purchase of the Aircraft and describe the nature of each individual's participation in the drafting of that form contract." Subject to objections, Diamond Aircraft forthrightly, fully, and completely responded to Interrogatory 2 by providing the following:

1. Cathy Wood: Secretarial;
2. Jeff Owen: Amendment of standard order form to order agreement form for position reservation; and
3. Peter Maurer: Final approval of order agreement form with limited specifications and subject to price changes.

As the response demonstrates, Horowitch has both provided full information regarding the identities of those who drafted the form Contract, and has described the nature of their participation. No further response is called for in the interrogatory. Horowitch's assertion that "Diamond has flatly refused to provide any information actually responsive to Interrogatory 2" and "only provided the names of three individuals that participated in filling in the blanks on and execution of the form Contract," can only be the product of a willful misreading of Diamond's response. Simply put, Diamond Aircraft answered Horowitch's question.

Notwithstanding Diamond Aircraft's complete response, Horowitch claims Diamond Aircraft should produce additional information regarding the identity of the drafters of the Contract because "courts will look to the conditions and circumstances surrounding the transaction in addition to the words of the contract." (Plaintiff's Motion to Compel, p. 6). To support his assertion, Horowitch claims that the identities of the drafters of the Contract and their industry experience will be relevant to the interpretation of the Contract and cites *City of Tampa v. Ezell*, 902 So. 2d 912 (Fla. Dist. Ct. App. 2005); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671 (Fla. 1944); and *In re Chisari*, 183 B.R. 963 (M.D. Fla. 1995) for this contention.

None of those cases, however, supports Horowitch's position. In each of the above-referenced cases, the court analyzed the contracts at issue by examining the intention of the parties thereto, not by looking to other contracts involving "similar transactions." *See City of Tampa,* 902 So. 2d at 914 (allocating responsibility to the DOT for adjoining sidewalks in a breach of contract action by construing the words of the contract and "taking into consideration what the parties sought to accomplish by entering into the [a]greement"); *Florida Power Corp.*, 154 Fla. at 644 (finding inconsistent and conflicting clauses must be construed so as to effectuate the intention of the parties as gathered from the entire instrument and holding that an act of God was a legal justification for the non-delivery of energy as provided for by the terms of the contract); and *In re Chisari*, 183 B.R. at 967 (holding extrinsic evidence is admissible only if the contract is ambiguous on its face and allowing parol evidence in the form of testimony to explain a latent ambiguity in a student loan dischargeability case).

Horowitch's citation to these cases is puzzling in light of Diamond Aircraft's complete and responsive answer, which fully addresses the query posed in Interrogatory No. 2. Although

Diamond Aircraft has preserved its objections of overbreadth and relevance, it has nonetheless fully responded to Interrogatory No. 2 by providing the names of the individuals who participated in the drafting of the Contract at issue: Cathy Wood, Jeff Owen, and Peter Maurer. Further, these same individuals have been identified for depositions, and are ready to sit for depositions to address Horowitch's legitimate questions.

b. Interrogatory No. 4

Interrogatory No. 4 requests information relating to conversations and communications between Diamond Aircraft and Horowitch. Continuing his pattern of creating an issue where none exists, Plaintiff complains in spite of the fact that Diamond Aircraft fully and properly responded to Interrogatory No. 4 by providing the names of Diamond Aircraft employees, agents, and representatives who conversed or communicated with Dr. Horowitch. Specifically, Diamond Aircraft stated:

> a) John Gauche was involved in discussions surrounding transfer of DA-42 order to D-Jet order; b) The price was pro forma for all order reservations; c) Documents produced in connection with Defendant's Rule 26(a)(1) Initial Disclosures indicate that Plaintiff knew how deposit would be made and when received; d) Peter Maurer's notes of conversations with Plaintiff were disclosed in connection with Defendant's Rule 26(a)(1) Initial Disclosures. At the Aircraft Owners and Pilots Association ("AOPA") Expo, Plaintiff told Mr. Maurer that the D-Jet was beautiful and that it was worth more than $850,000. Plaintiff also told Mr. Maurer that he might have been open to a more moderate price adjustment.

Diamond Aircraft submits that its response is a full and complete answer to Horowitch's interrogatory. Diamond Aircraft's response describes clearly the extent to which Diamond Aircraft communicated with Horowitch regarding the transaction at issue or properly refers Horowitch to previously produced documents that are responsive to the interrogatory. Diamond Aircraft has therefore fully and properly responded to Interrogatory No. 4.

c. Interrogatory Nos. 5 and 7 and Requests for Production Nos. 7 and 8

In his Motion to Compel, Horowitch grouped together Interrogatory Nos. 5 and 7 and Requests for Productions Nos. 7 and 8 because the requests seek information about other prospective purchasers of the D-Jet. For the sake of brevity, Diamond Aircraft summarizes Horowitch's interrogatories and requests for production and Diamond Aircraft's responses thereto.

Interrogatory No. 5 requests information relating to internal Diamond Aircraft conversations or communications regarding several different topics. Diamond Aircraft objected to Interrogatory No. 5 to the extent that it seeks information relating to internal conversations or communications regarding information that is protected from discovery pursuant to the attorney-client privilege or work product doctrine. Diamond Aircraft also objected to Interrogatory No. 5 to the extent that it seeks information regarding "any other individual or entity who placed a deposit with Diamond for a Single Engine Jet Aircraft who was later informed the base price for the Aircraft would be in excess of $850,000," on grounds that such information is not relevant or reasonably calculated to lead to the discovery of admissible evidence. (*See* Plaintiff's First Set of Interrogatories, Interrogatory No. 5(e)). Subject to those objections, Diamond Aircraft referred Plaintiff to documents produced in connection with Defendant's Initial Disclosures.

With respect to Interrogatory No. 7 and Request for Production Nos. 7 and 8, Diamond Aircraft objected to each discovery request tailored to seek information or documents relating to other individuals, besides Horowitch, who entered into contracts with Diamond Aircraft to purchase an aircraft. Diamond Aircraft objected to these requests on grounds that said requests are overly broad, unduly burdensome, and not relevant or reasonably calculated to lead to the discovery of admissible evidence. In his Motion to Compel, Horowitch asserts that "the identity

of other witnesses who may have had experiences similar to that of Plaintiff is plainly relevant to Plaintiff's claim." (*See* Plaintiff's Motion to Compel, p. 10). Horowitch relies on *City of Tampa*, 902 So. 2d at 914 (Fla. Dist. Ct. App. 2005); *Florida Power Corp.*, 154 Fla. at 643-44, 18 So. 2d 671, 674 (Fla. 1944); and *In re Chisari,* 183 B.R. at 967 (M.D. Fla. 1995) to argue that evidence of similar transactions bears on the conditions and circumstances surrounding the Contract and are thus discoverable. Horowitch also suggests that, per Fla. Stat. § 90.404, evidence of similar transactions will more than likely be admissible in a trial of this matter.

In none of the cases Horowitch cites – *City of Tampa*, *Florida Power Corp.*, or *In re Chisari* – did the court look to evidence of "similar transactions" to interpret the contact in question. While the holdings suggest that the "intent of the parties should be determined from the words of the contract as a whole," *City of Tampa*, 902 So. 2d at 914, none of the rulings intimate that courts should look to extrinsic contracts outside the contract at issue to resolve issues regarding the parties' intent or surrounding circumstances. Further, Florida law clearly provides that where the terms of a contract are unambiguous, the parties' intent must be determined from the "four corners" of the document. As the Florida Court of Appeals stated in *Fecteau v. Southeast Bank, N.A.,* 585 So. 2d 1005, 1007 (Fla. Dist. Ct. App. 1991), "[i]n the absence of ambiguity, the language itself is the best evidence of the parties' intent and its plain meaning controls."

Horowitch's attempt to obtain the identity of other prospective purchasers has absolutely nothing to do with this lawsuit and appears to be an improper effort to bring extrajudicial pressure on Diamond Aircraft, by attempting to stir up trouble with other customers in an action relating solely to Horowitch. This is not a class action lawsuit; Horowitch cannot stand in the shoes of others who may have similar claims against Diamond Aircraft; and Horowitch's counsel

does not represent other Diamond Aircraft customers. Moreover, Horowitch fails to explain how the identity of other prospective purchasers will aid this Court in construing the terms of the Contract at issue or examining the intentions of the parties – Horowitch and Diamond Aircraft. Controlling law provides that where the terms of a contract are unambiguous, the parties' intent must be determined from the "four corners" of the document. In this case, Horowitch does not assert that the terms of the contract are ambiguous or unclear. This Court must therefore examine the intentions of Horowitch and Diamond Aircraft by looking to the express language of the Contract.

Further, even if the Court were inclined to permit evidence of "similar transactions" at trial (which the Court should not permit based on the above discussion), the Federal Rules of Evidence, not Fla. Stat. § 90.404, would apply. Diamond Aircraft therefore preserves and stands on its objections to Interrogatory Nos. 5 and 7 and Request for Production Nos. 7 and 8 on grounds that said requests are overly broad, unduly burdensome, and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

d. Interrogatory No. 6

In complaining about Diamond's response to Interrogatory No. 6, which requests that Diamond Aircraft "describe the location of all records, electronic or otherwise, regarding the proposed transaction described in the Complaint in this action which began with Dr. Horowitch, on or about March of 2002 to the present day," Plaintiff returns to his pattern of creating issues where none exist. Far from "stonewalling," as Plaintiff falsely claims, Diamond Aircraft has freely, fully, and completely responded to the question that was put to it by providing the address of the location where Diamond Aircraft has access to electronically stored information: 1560 Crumlin Sideroad, London, Ontario.

Diamond Aircraft frankly does not understand why Horowitch disputes its response to this interrogatory. Horowitch did not define the term "location" in the context of the interrogatory, and counsel for Horowitch did not ask for additional information relating to the location of Diamond Aircraft's records in subsequent correspondence. (*See* Email from Jennifer Dempsey to James Washburn, attached hereto as Exhibit C, in which she writes, "...[W]e inquired about any electronic documents that you expect Diamond will have that might prove relevant to the dispute ... You all indicated you would get back to us about that. Please let me know if you have anything to add in this regard, other than the information you have provided in your initial disclosures.") If Horowitch seeks additional information regarding a "description" of where Diamond Aircraft stores its records, Horowitch should clarify and resubmit its interrogatory.

e. Request for Production No. 6

Again repeating his pattern, Horowitch seeks an additional response to Request for Production No. 6, which asks for copies of all marketing material, promotional material, or informational material regarding the D-Jet that was created or provided to any customers or potential customers. Diamond Aircraft preserved its legitimate objections on grounds of vagueness and relevancy, and then provided a complete, substantive response as follows: "Subject to and without waiver of the foregoing objections, Diamond Aircraft Diamond Aircraft refers Plaintiff to the documents produced in connection with Defendant's Rule 26(a)(1) Initial Discovery Disclosures."

As Diamond Aircraft's response to Request No. 6 indicates, Diamond Aircraft has already provided to Horowitch all documents that are responsive to this request, which included copies of brochures, magazine advertisements, and other promotional materials relating to the D-

Jet. Diamond Aircraft further responds that are no additional documents responsive to this request. Accordingly, Diamond Aircraft's reference to the documents that Diamond Aircraft has produced provides a complete response to this request.

f. Request for Production Nos. 1, 3, 13, 14, 15, and 16

Continuing his pattern of attempting to create an issue where none exists, Horowitch's Motion seeks to compel additional responses to Request for Productions No. 1, 3, 13, 14, 15, and 16. In summary, these requests seek information relating to the sale of the D-Jet; correspondence with Horowitch; documents that support Diamond Aircraft's defenses in this action; and documents relating to Horowitch's breach of the Contract. For each of the requests for production, Diamond Aircraft referred Plaintiff to documents produced in connection with Defendant's Initial Disclosures.

Moreover, in responding to Horowitch's discovery letter dated February 8, 2007 (attached hereto as Exhibit A), Diamond Aircraft produced additional responsive documents and further responded, "The documents enclosed herewith are also responsive to the above requests and fully respond to each request for production." (See Diamond Aircraft Letter to Horowitch attached hereto as Exhibit B). Thus, Diamond Aircraft made clear that there were no additional responsive documents in its possession to produce. Diamond Aircraft has properly and completely responded to these requests.

g. Request for Productions Nos. 2, 12, and 21

These requests seek information relating to Diamond Aircraft's decision to increase the list or base price of the aircraft, including internal and external documents. Read liberally, the requests seek production of voluminous engineering, manufacturing and financial documents that are the intellectual property of Diamond, created at great cost, and the disclosure of which

would cause immeasurable harm to Diamond in the highly competitive "Very Light Jet" market. Diamond Aircraft objected to the requests on grounds that the requests are overly broad, unduly burdensome, and seek documents that are not relevant to any claim or defense of any party. Diamond Aircraft further objected to the extent that they call for the production of documents containing proprietary, confidential, or trade secret information, without agreement upon and entry of a suitable confidentiality order.

The execution of the proposed confidentiality agreement attached to Horowitch's letter dated February 8, 2007 does not resolve Diamond Aircraft's objections with respect to burdensomeness and relevance for the following reasons: (1) To respond to Horowitch's requests would require Diamond Aircraft to engage in an overly burdensome exercise of producing all of its engineering documents related to design, specifications, and manufacturing of the D-Jet, which would consist of thousands of proprietary documents and impose a considerable expense to Diamond Aircraft to produce such documents. (2) Diamond Aircraft has already provided a detailed summary of the changes to the design and specifications of the D-Jet in its August 31, 2006 letter to Horowitch (attached to Plaintiff's Complaint as Exhibit C). Finally, (3) the production of these highly sensitive commercial documents offers little relevance to the Contract at issue. There is no issue in this case as to whether the price increase was "legitimate," "reasonable," or "justified." Instead, the issue is whether Diamond was within its contractual rights to increase the price of the aircraft. The information and documents sought in these requests in no way relate to that issue. In short, the proprietary interests of Diamond Aircraft far outweigh the purported reasons for Horowitch's desire to view this highly confidential information, especially in light of express contractual terms that permit Diamond

Aircraft to change the specifications without notice. Accordingly, these request are improper and unduly burdensome.

h. Request for Productions Nos. 5 and 10

Request No. 5 seeks "all documents referring to, relating to, or regarding the letter Diamond sent to Dr. Horowitch on August 31, 2006." Diamond Aircraft objected on grounds that said request is so overbroad and vague as not to be susceptible of reasoned interpretation. Read liberally, it is another way of requesting the broad spectrum of proprietary engineering, manufacturing and financial documents, and is objectionable for the same reasons given in the section above. The possible list of responsive documents is endless. Additionally, any documents related to the drafting of the Contract at issue are privileged communications between Diamond Aircraft and its attorneys and/or attorney work product.

Similarly, Request No. 10 seeks "all documents referring to, relating to, or regarding the drafting of the Contract, the form of the Contract, and the enforceability of the Contract." Diamond Aircraft objected again on grounds of vagueness and to the extent it seeks documents that constitute or reflect privileged communications between Diamond Aircraft and its attorneys and/or attorney work product. As with Request No. 5, the object of Request No. 10 is unclear, and Horowitch has made no effort to clarify these requests in subsequent discussions. Construed liberally, this Request could encompass all caselaw relating to the enforceability of the Contract, attorney work product, and proprietary information relating to Diamond Aircraft's products and services. Because of the ambiguity of these responses, the Court should refuse to compel answers on grounds of vagueness and overbreadth.

i. Request for Productions Nos. 9 and 11

Returning to form, Horowitch's Motion seeks to compel additional responses to Request for Productions Nos. 9 and 11, which relate to documents regarding the negotiation of the Contract and Diamond Aircraft's decision to accept Horowitch's offer and other similar offers to purchase the D-Jet.

Diamond Aircraft fully responded to the requests by referring Horowitch to documents previously produced in connection with Defendant's Initial Disclosures. Further, Diamond Aircraft's position remains steadfast that information concerning documents relating to similar offers by other purchasers — largely the basis of this Motion — is simply beyond the pale. While Horowitch continues to cite *City of Tampa* for the proposition that "the court should consider the conditions and circumstances surrounding the parties and the objects to be obtained in executing the contract," *see City of Tampa*, 902 So. 2d at 914, the holding of *City of Tampa* has no relevance in this case and does not support Horowitch's contention. As previously explained, in *City of Tampa*, the court examined the intentions of the party by construing the terms of the agreement within the four corners of the contract. The court did not look to "similar" contracts to ascertain the parties' intentions. Information about every potential purchaser of the D-Jet, besides Horowitch, is not relevant to the lawsuit, is overly broad, and borders on harassment. Accordingly, Horowitch's request for this information should be denied.

CONCLUSION

For the foregoing reasons, Diamond Aircraft respectfully requests that the Court deny Plaintiff's Motion to Compel in its entirety and grant Diamond Aircraft such other and further relief as the Court deems just and proper.

Respectfully submitted, this 16th day of March, 2007.

/s/ James A. Washburn
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CERTIFICATE OF SERVICE

This is to certify that on March 16, 2007, I electronically filed the within and foregoing DEFENDANT DIAMOND AIRCRAFT INDUSTRIES, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL with the Clerk of Court using the Court's electronic filing system, which will automatically send email notification of such filing to the following attorneys of record:

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